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# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 592

A. A. SPRAGUE, AS RECEIVER FOR THE CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY, PETITIONER

*v.*

J. ALBERT WOLL, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the district court (R. 544–548) and the opinion of the circuit court of appeals (R. 574–579) have not yet been reported. The reports of the Interstate Commerce Commission (R. 167–174, 523–536) are reported in 219 I. C. C. 135, and 234 I. C. C. 13.

### JURISDICTION

The decree of the circuit court of appeals was entered on July 22, 1941 (R. 580). The petition for writ of certiorari was filed on September 8, 1941.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the determination of the Interstate Commerce Commission that the North Shore is not an interurban electric railway within the meaning of the exemption proviso in Section 1, First, of the Railway Labor Act is arbitrary, capricious, unsupported by substantial evidence, or otherwise contrary to law.

2. Whether the determination of the Interstate Commerce Commission that the North Shore is "a part of the general steam-railroad system of transportation" and for that reason also not covered by the aforesaid exemption proviso is arbitrary, capricious, unsupported by substantial evidence, or otherwise contrary to law.

3. Whether in the circumstances of this case, after it had once determined that the North Shore was an interurban railway exempt from the Act, the Interstate Commerce Commission had power on its own motion to reopen the proceeding for further hearing and then to hold that the North Shore was not an interurban railway.

## THE STATUTE INVOLVED

The section of the Railway Labor Act (44 Stat. 577, as amended, 48 Stat. 1185, 45 U. S. C., Secs. 151–163) primarily involved is the proviso in Sec-

tion 1, First, exempting certain interurban electric railways from the definition of "carrier." This proviso reads as follows:

> * * * *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

STATEMENT

Upon request of the National Mediation Board, the Interstate Commerce Commission instituted a proceeding to determine whether the Chicago, North Shore & Milwaukee Railroad (hereinafter called the North Shore) came within the proviso exempting certain electric railways from the Railway Labor Act. After the hearing, at which the carrier's contention that it was an interurban electric railway within the proviso was unopposed, Division 3 of the Commission on November 7, 1936, issued its report finding the North Shore to be exempt (R. 167–174). On August 29, 1937, Division 900 of the Amalgamated Asso-

ciation of Street, Electric Railway, and Motor Coach Employees of America, and on February 9, 1938, the Commissioner of Internal Revenue, requested the Interstate Commerce Commission to determine the status of the carrier under the identical exemption provisos in the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937, respectively. The complaint filed by the Amalgamated contained allegations (subsequently found to be true) inconsistent with some of the principal facts upon which the Commission's report in the Railway Labor Act proceeding had relied (R. 178). The carrier moved to discontinue the proceeding on the ground that the matter had been settled in the Railway Labor Act case (R. 181–190). The Commission denied the motion, and at the same time, on its own motion, reopened the Railway Labor Act proceeding for further hearing and consolidated it with the hearing under the Railroad Retirement Act and Carriers' Taxing Act in order that the status of the carrier under all three statutes might be considered and determined on the same record and in the same proceeding (R. 195–196). A more comprehensive record was compiled at the second hearing, which was adversary in nature (R. 202–518), and the full Commission held on July 11, 1939, that the carrier was not an interurban railway and also that it was a part of the general

steam-railroad system of transportation (R. 522–536).

Thereupon, petitioner brought this action to enjoin the United States Attorney from enforcing the Railway Labor Act against it on the grounds that the determination of the Interstate Commerce Commission that the North Shore was not exempt from the Railway Labor Act was unsupported by substantial evidence, arbitrary and capricious (R. 16), and that the Commission had no power to reopen the case after its original ruling that the carrier was exempt (R. 13–14). The Interstate Commerce Commission and Division 900 of the Amalgamated intervened as parties defendant (R. 46–50, 57, 71). After trial, at which the only evidence consisted of the record before the Commission, the district court held that the Commission's decision was supported by substantial evidence and that the Commission had power to reopen the proceeding after its original determination (R. 544–550). The circuit court of appeals affirmed (R. 574–579).

The facts in the record which support the Commission's decision may be summarized as follows:

The North Shore operates an electric railway between Chicago and Milwaukee; between the outskirts of Chicago and Waukegan (about half of the distance from Chicago to Milwaukee (R. 407)) the carrier operates two lines, one known as the Shore Line and the other as the Skokie Valley

Line (R. 241). Most through and freight traffic is carried on the Skokie Valley route, generally referred to as the "main line" (R. 227, 247, 257, 104, 358, 395). The roadbed and trackage from Chicago to Milwaukee through the Skokie Valley is comparable with that of the steam railroads (R. 242, 275–277, 214). Carload freight in standard steam equipment can be carried over the entire line except for 22 miles between Evanston and Highland Park on the Shore Line route and between freight terminals at Buena Park, Chicago, and Harrison Street, Milwaukee, and the downtown sections of those cities (R. 527, 211, 228, 239, 425).

The North Shore carries suburban passenger traffic, but in addition is engaged in operating a through passenger service between Chicago and Milwaukee which in speed, number of trains, and kinds of service is comparable to that of the steam roads (R. 245, 324, 424, 529), one of which, the Chicago & North Western, runs parallel to the North Shore (R. 358, 365).[1]

In 1937 the North Shore carried over 36,000 cars or 1,599,403 tons of carload freight, 99 per-

[1] The average speed of the North Shore trains between the cities of Chicago and Milwaukee is about 55 miles an hour, which compares favorably with that of the trains of the Chicago & North Western Railroad (R. 245). Indeed, the North Shore acquired "top honors" for fast trains in a rating comparing all of the railroads in the country (R. 324). Some of the trains contain dining and parlor cars (R. 218–19, 245, 252, 363).

cent of which was interchanged with steam lines and thus was obviously of the same character as that carried by the steam roads, and 110,000 tons of less than carload freight, only a small proportion of which was interline (Exhibits 17 A, 60A, R. 414-415, 501). Altogether, over 93 percent of the freight carried was interchanged (*ibid.*). With respect to two-thirds of the carload freight, the North Shore acted as connecting carrier between one steam line and another (Exhibit 19A, R, 417). It carried the freight in trains frequently as long as 20 cars, and sometimes, with engines coupled, as long as 65 (R. 215, 219, 376, 449). Approximately 23 percent of its transportation revenues was derived from freight traffic (Exhibits 57A, 58A, R. 339, 491–493). The density of this traffic, as shown by freight revenue per mile, is greater than was the case on the Texas Electric, the Utah Idaho Central and most of the other electric railways which have been held not to be interurban within the meaning of the Railway Labor Act (Ex. 34A–38A, R. 319–320, 435–441), and also greater than that of several steam roads of the northwestern region (Ex. 39A, R. 443–444, 321). The North Shore's carload freight operations have been steadily growing in importance; freight operations were conceded by petitioner's main witness to be "the most profitable part of our business" (R. 387).

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ARGUMENT

## I

On the merits, the decision below is shown to be correct by the decision of this Court in *Texas Electric Railway Co.* v. *Eastus*, 308 U. S. 512, affirming *per curiam*, 25 F. Supp. 825, which upheld a determination of the Interstate Commerce Commission that the Texas Electric Railway was not an interurban exempt from the Railway Labor Act.

The North Shore and the Texas Electric clearly fall within the same class. Indeed, in many respects, the North Shore more closely resembles a standard steam railroad than did the Texas Electric. This is true as to its physical characteristics and as to the manner in which both its passenger and freight operations are conducted. Whereas the Texas Electric was lighter in construction, the Skokie Valley route of the North Shore compares favorably in construction with the steam roads (cf. 208 I. C. C., at 195, with R. 249, 255, 273–274, 330, 357). Although the passenger service of the Texas Electric was concededly interurban in character (appellee's brief, p. 15), the North Shore operates a passenger service between Chicago and Milwaukee which is comparable in speed and accommodations to that performed by the steam lines (R. 218–219, 245, 252, 324, 363, 424).

The North Shore runs much longer freight and passenger trains than the Texas Electric (cf. 208 I. C. C., at 197, with R. 215, 219, 376, 449, 245). Both its gross freight revenues and the density of its freight traffic, as demonstrated by freight revenues per mile, are from 3 to 4 times as great as in the *Texas Electric* case [2] (Ex. 36A, R. 437). The North Shore interchanges a fraction more than 93 percent of the freight carried, which was the percentage reported for the Texas Electric (R. 416).

The North Shore derives about 23 percent of its revenues from the transportation of freight (R. 491, 493). In the *Texas Electric* case, the Government contended that the percentage of the carrier's freight revenues was 37 (appellee's brief, p. 19), while the carrier claimed that the percentage was 20 (appellant's brief, pp. 18, 61, 62).[3] The affirm-

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[2] In 1933, the last year for which data was before the Commission, the freight revenues of the Texas Electric were $215,000 (R. 437, 208 I. C. C., at 196); those of the North Shore in 1937 were $811,000 (R. 437, 493). Freight (including mail and express) revenues per mile for the Texas Electric in 1933 were $1,436; for the North Shore (excluding mail and express) in 1937, $5,881 (R. 437). For the year 1936, Texas Electric freight revenues were $439,616, still much less than those of the North Shore, and freight revenues per mile $1,971, to $5,616 for the North Shore (R. 435–436).

[3] The difference between the two figures is explained by the fact that the Government's computation dealt only with the last year in the record rather than the preceding five-year period, and excluded from "passenger revenues" the substantial revenues of a city street car line operated by the carrier.

ance by this Court *per curiam* would appear to indicate that the difference was of slight consequence. In any event, any difference in the proportion of freight revenues must be balanced against the other characteristics of the two roads. Clearly, in view of all of the above facts the Commission did not act arbitrarily or without substantial evidence in putting the two carriers within the same general category.

In *Hudson & M. R. Co.* v. *Hardy,* 103 F. (2d) 327 (C. C. A. 2), certiorari denied 307 U. S. 640, where the electric railway carried only passenger traffic, but derived 22.97 percent of its revenues from the operation of a joint service with the Pennsylvania railroad, it was held that the relationship between the two carriers was sufficient to justify a finding by the Commission that the road was a part of the Pennsylvania system and hence was within the clause in the exemption proviso excluding from the exemption electric railways operated as "a part of a general steam-railroad system of transportation." The percentage of non-local passenger traffic in that case, it will be noted, is almost identical with the percentage of the petitioner's freight revenues here.[4] This

[4] The fact that the *Hudson & Manhattan* case was decided on the basis of another clause in the exemption proviso does not weaken it as authority for the proposition that evidence applicable only to 23 percent of a carrier's operations may be sufficient to support a Commission determination that the carrier is not exempt from the Act.

Court's denial of certiorari, when similar contentions as to the importance of ratios and percentages were raised, clearly suggests that questions of the type presented here are not of sufficient general importance to warrant the granting of the writ.

## II

The decision below does not conflict with *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1.[5] That case arose under Section 20a of the Interstate Commerce Act (41 Stat. 494, 49 U. S. C. § 20a), which contained a somewhat similar statutory exemption for interurban electric railways, but did not authorize the Interstate Commerce Commission to determine which lines came within the exemption. Suit was brought by the United States in the district court, which, after trial, found the facts and determined that the North Shore was an interurban railway. This Court affirmed, its opinion twice pointing out that the question was "not free from difficulty" (288 U. S. 1, 10–11, 13).

1. In the earlier *North Shore* case the courts were called upon to determine the carrier's status

[5] Petitioner also asserts that the decision below is in conflict with *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, and the *Hudson & Manhattan* case, *supra*. Each of those cases held the carriers involved subject to the Railway Labor Act; they obviously do not conflict with the case at bar.

as an original proposition. Here the Court's task is to determine whether an administrative decision is arbitrary or unsupported by substantial evidence. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 185. If we assume that the facts in the instant case are identical with those previously before the Court, it still cannot be said that the Commission acted arbitrarily, particularly since the Court recognized the issue to be a close one.* The Court has frequently stated that in reviewing administrative decisions, "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304. Cf. *Virginian Ry.* v. *United States*, 272 U. S. 658, 665–666; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775; *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 226.

2. The first *North Shore* case is also distinguishable because of the absence here of the equitable considerations which were deemed of "great significance" in the former decision (288 U. S. 1,

* In this connection the three-judge district court in the *Texas Electric* case (25 F. Supp. 825, affd. 308 U. S. 512), declared with respect to the *North Shore* case (25 F. Supp., at 833): "One cannot very well say that the Supreme Court, in the latter case, would have overturned a finding by the Commission that the road was not entitled to the proviso, had the Commission acted under the congressional authority given it in 1934."

12–14). A decision holding the North Shore a "carrier" under Section 20a might have invalidated millions of dollars of securities previously issued without objection by, although with the knowledge of, the Interstate Commerce Commission.[7]

3. Differences in the records before the Court then and now also serve to distinguish the Section 20a case from the case at bar. This Court's opinion in the first case (288 U. S., at 9) indicated that carload freight could not be handled in Chicago and Milwaukee and that such freight could not be interchanged in Chicago; the present record shows the contrary (R. 211, 217, 228, 258, 260–262, 304, 376–379, 407, 409). The findings (R. 145, 146) and opinion in the first case (288 U. S., at 9) imply that the grades, curves, and other restrictions which would limit the use of steam railroad freight cars are found generally along appellant's lines;

[7] Although the Commission had informally treated the North Shore as exempt from Section 20a, it had formally held the carrier to be subject to the Locomotive Inspection Act which contained a similar exemption proviso. *In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power other than Steam Power*, 122 I. C. C. 414, 428, 439 (1927). Thus, whatever the practice under section 20a itself, there had been no uniform administrative construction holding the North Shore covered by all of the exemptions for interurban lines in the various provisions of the Interstate Commerce Act and related statutes. See *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312.

the present record shows that such conditions are not applicable to the main through route through the Skokie Valley (R. 211, 249–252, 255, 273). Moreover, between 1930 and 1937 the proportion of freight revenues from freight interchanged with other lines rose from 42 percent to 71.75 percent and the proportion of freight tonnage so interchanged from 78 percent to over 93 percent (cf. 288 U. S., at 9, with R. 415).

These distinctions might not be regarded as of great consequence if the Court had not given weight to the facts mentioned in deciding what it indicated to be a close case. They might under the circumstances have caused the Court to reach a different conclusion, and certainly are sufficient to show that the determination of the Interstate Commerce Commission on the present record is not an arbitrary one in conflict with this Court's decision.

## III

Petitioner contends that the Commission had no power to reopen the proceeding under the Railway Labor Act after having held the North Shore to come within the exemption proviso.

1. Neither the Railway Labor Act nor the Interstate Commerce Commission Act expressly authorizes the Commission to reopen cases on its own motion, although Section 16a (now Section 17 (6), 54 Stat. 915) of the latter Act authorizes the Com-

mission to grant rehearings on application of a party, Section 13 (2) empowers it to "institute" inquiries on its own motion, and Section 16 (6) permits it to "modify its orders." Nevertheless, it has long been the accepted construction of the latter statute and the common practice of the Commission under it to reopen proceedings and to modify orders upon its own motion. In a number of cases the Commission has expressly held that it has such power.[8] In Sharfman, *The Interstate Commerce Commission*, Vol. IV, p. 240 (1937), it is stated:

> * * * Most cases that are reopened for further proceedings before the Commission are supplemented, reheard, reargued, or reconsidered in response to petitions of the parties; *but frequently, also, and with undoubted authority, the Commission reopens proceedings on its own motion.* * * * [Italics supplied.]

This power has never been doubted by any court; on the contrary, the Commission's power to modify its orders upon its own motion has been upheld. *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*,

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[8] E. g., *American Cyanamid Co.* v. *Ann Arbor R. Co.*, 196 I. C. C. 641; *Tompkins-Kiel Marble Co.* v. *Lehigh Valley R. Co.*, 191 I. C. C. 355, 357; *Creomulsion Co.* v. *Southern Ry. Co.*, 185 I. C. C. 724, 727; *Lignite Coal from North Dakota, etc.*, 126 I. C. C. 243, 245; *Douglas & Co.* v. *Chicago, R. I. & P. R. Co.*, 21 I. C. C. 541, 544; *Wilbur Lumber Co.* v. *Director General*, 151 I. C. C. 759, 760.

269 U. S. 217, 225; *Froeber-Norfleet, Inc.* v. *Southern Ry. Co.*, 9 F. Supp. 409, 411 (N. D. Ga.).[9] In *Fly* v. *Heitmeyer*, 309 U. S. 146, 148, where the Federal Communications Commission reopened a proceeding upon its own motion, this Court approved its action, though the Communications Act grants the Commission no express authority to reopen.

There is no reason to believe that Congress intended the Interstate Commerce Commission to have less authority "to fashion [its] own rules of procedure" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143) in proceedings under Section 1 of the Railway Labor Act than in proceedings under other statutes subject to its jurisdiction. Indeed, Section 16a of the Commerce Act, which permits the Commission to hold rehearings on application of parties and thereby establishes the Commission's continuing jurisdiction over its proceedings (*Baldwin, Trustees* v. *Scott County Milling Co.*, 307 U. S. 478), refers to "any proceeding" before the Commission and thus would seem to apply to those under the Railway Labor Act.

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[9] Cf. *Baldwin, Trustees* v. *Scott County Milling Company*, 307 U. S. 478, 484; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 382 (concurring opinion); *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 445; *In re National Labor Relations Board*, 304 U. S. 486.

In any event, the power of administrative agencies on their own motion to reopen cases in order to correct errors, take additional testimony when there is ground to believe the original record inadequate, or bring about a reasonable uniformity in decision would appear to be inherent, in the sense that Congress would always intend it to exist even in the absence of an express statutory declaration. Cf. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 375, and cases cited *supra*. Statutes seldom regulate the minutiae of administrative procedure; such matters are generally left subject to administrative control, either through a general power to make rules or by necessary implication.

2. Whether or not the Commission may, under all circumstances, reopen its prior determinations, there can be no question that it acted reasonably and not in abuse of discretion in doing so in this case. It was desirable that the Commission reach a uniform decision as to the North Shore's status under the identical language of three statutes. And apart from this, the complaint filed in the Railroad Retirement Act case and the record subsequently made in the reopened proceeding negatived the existence of some of the facts upon which the Commission had relied most heavily in its original report.[10] The first record, for

[10] The Circuit Court of Appeals stated that "The evidence upon which the original report was based was very incom-

example, indicated that carload freight could not be handled or interchanged within the city limits of Chicago and Milwaukee (R. 117–118, 120–122), and that physical and franchise restrictions rendered the carrier generally unable to handle such freight in the same manner as the steam roads (R. 103–105, 119–120). The second record proved that the company had carload freight terminals in both cities (R. 211, 217, 228, 250, 262, 304, 407, 409) and an interchange connection in Chicago (R. 260–262, 228, 376–379), and that the restrictions in question did not apply to the through route along the Skokie Valley but only to portions of the road in downtown Chicago and Milwaukee and a section of the Shore Line (R. 211, 227, 249–252, 255, 273, 385). In general, it may be said that, perhaps as a result of its non-adversary character, inaccuracies and omissions in the first record left quite a misleading impression of the carriers' operations.

## CONCLUSION

There is no conflict between the decision below and that of any other circuit court of appeals or of this Court. The case has been correctly decided by the court below, the decision directly following that of this Court in the *Texas Electric* case. Ac-

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plete and inadequate" (R. 577), and that at the second hearing "additional facts were in evidence which had not been disclosed at the earlier, nonadversary hearing" (R. 576).

cordingly, the petition for certiorari should be denied.

Respectfully submitted.

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